BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICTOR MEZA	)	
Claimant	)	
	)	
VS.	)	
	)	
CALVIN OPP CONCRETE, INC.	)	
Respondent	)	Docket No. 1,060,588
	)	
AND	)	
	)	
KANSAS BUILDING INDUSTRY WORK COMP FUND	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the September 11, 2012, preliminary hearing Order entered by Administrative Law Judge John D. Clark. James A. Cline, of Wichita, Kansas, appeared for claimant. Roy T. Artman, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant suffered an accidental injury on December 26, 2011, that arose out of and in the course of his employment with respondent, and that claimant gave respondent timely notice of the accident.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 11, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant failed to prove he suffered an accidental injury that arose out of and in the course of his employment with respondent. Respondent further contends claimant failed to provide it with timely notice of his alleged accidental injury.

Claimant asks that the Board affirm the ALJ's Order in its entirety.

The issues for the Board's review are:

(1) Did claimant prove he suffered an accidental injury that arose out of and in the course of his employment with respondent?

(2) If so, did claimant provide respondent with timely notice of his accidental injury?

FINDINGS OF FACT

Claimant had worked for respondent for about 15 years before his accident. On December 26, 2011,[1] he was working in Joplin, Missouri, using a 2 x 4 to smooth concrete. He was using the 2 x 4 to hit the cement because it was hard. His hands became stiff and started cramping, and he could not hold on to the 2 x 4. He was sweating and felt like he had a fever. He told his supervisor, Juan Ponce, he thought he had a cold. Mr. Ponce told claimant to go back to the hotel, but claimant could not understand his English so he stayed in the company truck the rest of the day. Claimant did not work the next day but went back on Friday. He was unable to work on Friday because he was weak. He could not walk, and his right leg felt strange. He went home because he thought he had a cold. He did not know he had a work injury.

On January 19, 2012, claimant went to the Center for Health and Wellness, where he was seen by a physician's assistant. Claimant complained of weakness in his right arm and right leg with an onset 15 days earlier. He also complained of numbness in his right hand. Claimant said he had a cold and suffered a lot of muscle pain and that he could not work because of the pain. A CT scan was done to check for stroke, which showed "moderate periventricular white matter changes" that "may be due to chronic microvascular ischemia."[2] Thereafter, an MRI was ordered, which was performed on January 27, 2012. The impression was "[m]oderate bilateral white matter disease, nonspecific with regard to etiology."[3] Claimant was told he did not have a stroke.

On February 2, 2012, claimant was taken to the emergency room at Via Christi St. Francis Hospital by his brother. He was still having problems with right arm and leg weakness. Claimant had also been falling. Claimant was admitted to the hospital because it was initially thought he had a stroke. An MRI of his cervical spine done on February 3, 2012, showed that claimant had a herniated disc causing impingement on the cervical cord

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[1] Claimant seemed to think that December 26, 2011, was a Wednesday, but December 26, 2011, was a Monday.

[2] P.H. Trans., Cl. Ex. 1 at 40.

[3] *Id.* at 43.

at C4-5 and a probable disc herniation with extruded fragment at the C5-6 level. Claimant was told by Dr. Nazih Moufarrij that he had herniated discs in his neck. Dr. Moufarrij told claimant that he had suffered the injury at work. Claimant said Mr. Ponce was at the hospital at the time Dr. Moufarrij told him about the herniated discs and the fact that his condition was work-related. Claimant said that was the first he knew that he had been injured at work. Claimant then asked Mr. Ponce to tell his boss that his condition was work related. Claimant also said his cousin, who speaks English well, went to the office and told the secretary claimant needed money for his medical treatment. Dr. Moufarrij performed a decompressive cervical laminectomy C3 to C6 on claimant on February 6, 2012.

Claimant said at the time of his accident in December 2011, he was having difficulty with his right arm and leg. He stated his condition worsened, which is why he had surgery in February 2012. Claimant was seen by Dr. George Fluter, at his attorney's request, on January 16, 2012, in regard to an unrelated work-related injury to his left upper extremity. At that time, claimant complained of pain in his left shoulder and numbness in his thumb, index finger and middle finger of the left hand. Although claimant contends he was having problems with his right arm and leg that started three weeks before his January 2012 visit to Dr. Fluter, he made no mention of those problems to Dr. Fluter. Furthermore, Dr. Fluter's examination did not indicate he found any problem with claimant's right upper extremity, and he found claimant's cervical range of motion to be within functional limits.

Claimant was seen by Dr. Fluter again on May 29, 2012, at the request of claimant's attorney. Claimant told Dr. Fluter he was unable to move his right arm and right leg. He complained of pain affecting his neck and upper back. He continued to claim he had pain in his left shoulder and left upper extremity. In his examination, Dr. Fluter found that claimant's right upper and lower extremities were slightly weaker than the left. Further, Dr. Fluter said claimant had tenderness to palpation in the cervical paraspinal muscles and that claimant's cervical range of motion was limited in all planes. Dr. Fluter opined:

> Based upon the available information the work activities being done to finish concrete on 12/26/11, more likely than not, led to the herniation and extrusion of disc material at the C4-5 and C5-6 levels resulting in right-sided weakness for which diagnostic testing and treatment were done culminating in cervical spine surgery.
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> Under these circumstances, the prevailing factor is the work-related activities done on 12/26/11 leading to cervical disc herniation/extrusion and incomplete spinal cord injury.[4]

[4] P.H. Trans., Cl. Ex. 4 at 6.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

Claimant was screeding concrete with a 2 x 4 when he suddenly felt weak and dropped the 2 x 4. He felt cold and numb. His hands were stiff. But he also had a fever. He told his supervisor that he could not hold anything and could not lift anything. Claimant did not know what was causing his symptoms, but he thought it was a cold. This is what he told his supervisor. This was not timely notice of an accident. His supervisor told him to go to the hotel. Claimant went to the truck instead and did not work the rest of the day. Claimant tried to work again a couple of days later but could not. He was still having problems with his right arm and right leg. Claimant is alleging he suffered personal injury by an accident on December 26, 2011. He is not alleging a repetitive trauma injury.

The ALJ found claimant first reported his injury was work related in February 2012, after the diagnosis of the disc herniations. The ALJ found notice was timely under K.S.A. 2011 Supp. 44-520(a)(1)(B) because it was within 20 days of seeking medical treatment. But that statute requires notice be given by the earliest of the specified dates, one of which is within 30 days of the accident date.

Eventually, it was determined that claimant's arm symptoms were due to herniated discs in his cervical spine. The treating surgeon related claimant's disc herniations to claimant's work activities. Dr. Fluter did as well. There is no contrary expert medical opinion.

Unfortunately, claimant thought he was sick from a cold and that having a cold accounted for all of his symptoms. He did not think he had a work-related accident and injury on December 26, 2011, and so did not report one. The first time claimant became aware that his work was the cause of his upper extremity symptoms was after his MRI on February 3, 2012, when Dr. Moufarrij told him so. That was also the first time respondent

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[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2011 Supp. 44-555c(k).

learned that claimant was alleging a work-related injury. February 3, 2012, was more than 30 days after the date of accident. Therefore, notice was not timely.

CONCLUSION

Based on the record presented to date, the undersigned Board Member finds and concludes:

(1) Claimant suffered personal injury by accident on December 26, 2011, that arose out of and in the course of his employment with respondent.

(2) Claimant failed to give respondent timely notice of his accidental injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated September 11, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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John D. Clark, Administrative Law Judge